

## How to submit this form

# Submission form: Proposed amendments to the Accident Compensation (Review Costs and Appeals) Regulations 2002

The Ministry of Business, Innovation and Employment (MBIE) would like your feedback on proposals on updating the Accident Compensation (Review Costs and Appeals) Regulations 2002. Please provide your feedback by **5pm, on 28 March 2022**.

When completing this submission form, please provide comments, evidence, and any data that may aid your submission. Your feedback provides valuable information and informs decisions about the proposals.

We appreciate your time and effort taken to respond to this consultation.

## Instructions

**To make a submission you will need to:**

1. Fill out your name, email address, phone number and organisation.
2. Fill out your responses to the discussion document questions. You can answer any or all of these questions in the [discussion document](#). Where possible, please provide us with evidence to support your views. Examples can include references to independent research or facts and figures.
3. If your submission has any confidential information:
  - i. Please state this in the email accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (Official Information Act) that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act.
  - ii. Indicate this on the front of your submission (e.g. the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
  - iii. Note that submissions are subject to the Official Information Act and may, therefore, be released in part or full. The Privacy Act 1993 also applies.

## How to submit this form

### 4. Submit your feedback:

i. As a Microsoft Word document by email to [ACregs@mbie.govt.nz](mailto:ACregs@mbie.govt.nz) with subject line:  
*Consultation: Review Costs Regulations*

ii. By mailing your submission to:

The Manager, Accident Compensation Policy  
Ministry of Business, Innovation and Employment  
PO Box 1473

Wellington 6140  
New Zealand

## Submitter information

## Submitter information

MBIE would appreciate if you would provide some information about yourself. If you choose to provide information in the section below it will be used to help MBIE understand the impact of our proposals on different occupational groups. Any information you provide will be stored securely.

### Your name, email address, phone number and organisation

Name:	Hazel Armstrong
Email address:	Privacy of natural persons
Phone number:	
Organisation:	ACC Futures Coalition

- The Privacy Act 1993 applies to submissions. Please tick the box if you do **not** wish your name or other personal information to be included in any information about submissions that MBIE may publish.
- MBIE may upload submissions or a summary of submissions received to MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). If you do **not** want your submission or a summary of your submission to be placed on our website, please tick the box and type an explanation below:

I do not want my submission placed on MBIE's website because... [insert reasoning here]

### Please check if your submission contains confidential information

- I would like my submission (or identifiable parts of my submission) to be kept confidential, and **have stated** my reasons and ground under section 9 of the Official Information Act that I believe apply, for consideration by MBIE.

## Proposed updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002

### Proposed updates to the Accident Compensation (Review Costs and Appeals) Regulations 2002

#### Questions on the proposed objectives

1. Do you agree with the presented objectives?

Yes       No       Not Sure

2. Are there alternative objectives that should be considered to help shape the discussion? (please provide detail on any alternative objectives you consider relevant)

Encourage lawyers to specialise in ACC (Particularly Claimant work); reflect 'the True Cost of Representation'; balancing the resources available to the ACC when compared to the applicant; supporting the importance of dispute resolution for identifying error and oversights by ACC in its management of the scheme; and for public trust and confidence in the scheme.

#### Questions on the proposed cost categories

3. What do you think about the proposed cost categories?

Fine.

4. Do you agree with the proposed categories?

Yes       No       Not Sure

Why/ why not?

They reflect the usual steps in an ACC case.

5. Are there any other alternative options for grouping the cost categories that could be used? Please provide supporting information.

No.

#### Questions on Category 1 – Application costs

6. Should Application Costs (Category 1) remain separate from Representation Costs (Category 2)?

Yes       No       Not sure

Why/ why not?

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Regulations 2002**

Seems reasonable

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7. Do you agree with the proposed increase in maximum costs awardable for Application Costs? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

### Questions on Category 2 – Representation costs

8. Based on the options provided in this document, what is your preferred option? (please circle or highlight your response)

2.1 One maximum limit for all representatives

OR

2.2 Sliding scale based on complexity and/or time and, qualification of the representative.

Please provide the reasons for your view

2.2

We agree with the distinction set out in paragraph 50 of the discussion document.

9. Do you have any other suggested options or groupings to categorise Representation Costs (Category 2)?

No

10. Is there any information to support or reject the distinction that is made between lawyers and advocates (Option 2.2)?

Yes. As a legal aid provider, we have an obligation to inform Legal Services if the likelihood of success is low due to the evidence not being in favour of the claimant, if that is the situation, then legal aid will cease. This is another protection against unnecessary litigation when a client is represented by legal aid lawyers. This supports the idea of discouraging frivolous and excessive litigation.

ACC is a complex area of law. As lawyers, we are trained to do legal research and keep up to date with evolving precedent. Most specialist lawyers will support their practice by subscribing to relevant databases. We have obligation under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and have a regulator through the New Zealand Law Society if these standards are not

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upheld. Legal Aid lawyers must administer a trust account which carries with it onerous responsibilities. Advocates are not registered, cannot take money into a trust account and there is no oversight body.

11. Do the proposed new rates reflected in Option 2.2 reflect appropriate market rates for lawyers and advocates?

Yes     No     Not sure

If not, is there any information that can be shared to inform this discussion.

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Review costs should reflect 'the True Cost of Representation'; the resources available to the ACC when compared to the applicant; the importance of dispute resolution for identifying error and oversights by ACC in its management of the scheme; and for public trust and confidence in the scheme.

It is now known that it is financially and practically undesirable to specialise in ACC law. Even less practitioners are prepared to be legal aid lawyers specialising in ACC. ACC's legal and evidential services are entirely funded by ACC. This means that ACC can obtain multiple specialist reports (or panels with multiple specialists on them) and yet the cost regime expects claimants to discharge the onus of proof with expert evidence that they can ill-afford. The cost of litigation can exceed the benefit of the successful outcome. This is particularly true for hearing loss declines for cover and entitlement. This allows ACC to perpetuate decisions which are essentially 'unchallengeable' due to practical and financial considerations.

This submission uses Table 1 of the Discussion paper entitled "Proposed changes" and we add our suggestions in the final column.

All fees are listed GST exclusive.

The references to 1a, 1b, 2a, 2b relate to the Proposed changes table. '1' identifies as advocates and '2' as lawyers. '2' is the rate for lawyers holding a current practising certificate.

We agree with the distinction set out in paragraph 50 of the discussion document.

'A' and 'B' refer to complexity and/or time. So '2b' refers to lawyers handling a case with greater complexity. We comment on the definition of complexity later in the submission.

Category	Current Under current regs	Option 1	Option 2				Legal aid current	Our proposed changes
			1a	1b	2a	2b		
Application cost	\$136.35	\$150	\$150	\$150	\$150	\$150	Nil	<b>\$150</b>
Representation costs	\$886.32	\$1320.00	\$742.50	\$1320	\$1485	\$2640	\$1920 – \$2860 (Review)	<b>\$4,400 2a \$6,600 2b*</b>

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Band 2a will need to increase. At a minimum, the increase should match the lower end of the current legal aid rate \$1920. However, our proposal is that the increase is much more substantial to reflect hours put in to a case. Complex cases should be significantly increased.

### Time taken

### Legal issues

The claimant carries the onus of proof. This burden of proof means that we have to provide positive evidence to discharge the onus.

### ACC files

ACC files are delivered to lawyers in a muddle. 1,000s of pages randomly put together in no date order, with repetitions, and omissions. In order to take up a case we have to do a file review, this can take hours and hours.

### Obtaining medical evidence

Invariably we must obtain medical evidence.

It can be difficult for a legal representative to find a specialist to provide a report and it takes time finding that person. This is quite unlike ACC who have specialists that they regularly use. For example with a current hearing loss case (which is a treatment injury), I have approached 3 ENTs who are not willing to take on the case for one reason or another. It has taken 3 phone calls to one of the specialist's rooms to get him to even look at the file. Practising specialists are very busy, so to get their attention requires patience and effort.

### Requirement to assess prospects of success

Legal aid lawyers must assess prospects of success, and this requires obtaining a medical report, understanding the file, considering factual and legal aspects of the case.

Lawyers need to keep up to date with the way the bench is considering claims, for example the "but for" test previously discredited, has now found its way back into legal consideration; and the approach the courts are more recently taking to whether there is a new injury or whether pre-existing degeneration is the cause of the ongoing incapacity is subtly changing. The weight the bench gives to epidemiological evidence when applying the three part test of section 30 is subtly changing as well.

### Fees

\*The 2a band which we are proposing is based on 20 hours at a rate of \$220. The 2b band is 30 hours at a rate of \$220. This does not include the work on the file such as creating a bundle. A complex case that is legally aided can result in substantial write-offs by the firm. We, for example, have written off \$7,000 (using the standard \$124 an hour rate, which is the rate our firm uses for calculating write-offs for legal aid cases).

When giving an estimate to a paying client, the fee for legal representation ranges between 5-7.5k depending on the complexity of the case, excluding the cost of medical reports.

Even our proposed fees in the table are less than actual costs and reflect the concept that a claimant must make a contribution of about a third of the actual costs. If we go to the proposed costs from option 2 of the discussion paper, the contribution would represent about 1/3 of the cost of the fee and accordingly would result in about a 2/3 contribution by the client. Presently the contribution under the regulations is about 1/10 of the actual cost incurred.

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Legal Services pays about \$1920- \$2860 for legal representation at review. ACC will fund representation costs for a review of \$880 in costs. That is ACC currently funds about a quarter to a third of the legal aid debt.

Even if our proposed rates are adopted, this could still be a subsidized rate. The 12 hours that is suggested in the discussion paper for a complicated case is completely unrealistic.

### What is a complex case?

Simple cases, when a person is legally represented, generally do not go to hearing and gets settled beforehand. Nearly all cases that get to hearing, when a claimant is legally represented, are by necessity complex as the factual evidence is not straight forward. ACC review specialists are settling when the evidence is going against them. As a legal aid provider, we have an obligation to inform Legal Services if the likelihood of success is low due to the evidence not being in favour of the claimant, if that is the situation, then legal aid will cease. This is another protection against unnecessary litigation when a client is represented by legal aid lawyers.

We don't think that table 7 captures what is a complex review. Complexity can arise from cover decisions and suspension decisions. The complexity can arise when an injury spans a number of years, a large file with multiple reports or complex injuries such as involving mental injury and an injury that is multi-faceted, or occupational disease claims.

Insert a new regulation which sets a formula for annual increases to the costs in the Schedule.

12. Do you agree with the proposed new maximum costs awardable for Representation costs (both options)? (please circle or highlight your response)

Strongly Disagree
<b>Disagree</b>
Neither
Agree
Strongly Agree

13. Do you think the proposed changes will increase access to justice (and therefore improve outcomes) for claimants?

Yes     No     Not sure

If not, why not?

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If we go to the proposed costs from option 2 of the discussion paper, the contribution would represent about 1/3 of the cost of the fee and accordingly would result in about a 2/3 contribution by the client. Presently the contribution under the regulations is about 1/10 of the actual cost incurred.

If the objective is to improve access to justice, it will not sufficiently improve access to justice. A good proportion of claimant have lost their income and unable to work due to their injuries.

14. Is there any evidence/data or precedence that could be used to determine the complexity of a review (i.e. which cases should sit in which categories (ie A or B)?

- Size of file
- Length of time covered
- Complex claims such as treatment injuries and occupational disease claims
- Triggering of degenerative condition requires complex medical evidence
- Type of claimant i.e. suffering mental injury, angry, digital exclusion
- Agree that vocational independent is very complex and time-consuming

### Questions on Category 3 – Medical and Other Report costs

15. Currently, the medical reports categories can be used for multiple reports. Is there any information to suggest the capped approach is inappropriate? Please provide supporting information.

No, need flexibility to get multiple reports e.g. radiology and orthopaedic; Musculoskeletal and Psychiatrist to get diagnosis of chronic pain from physical injury. ACC itself obtains multiple reports that a claimant needs to respond to as the claimant has the onus of proof. The ACC use multi-disciplinary panels with up to 5 specialists on them and the claimant needs to respond to these complex reports.

A psychiatrist's report can cost up to \$7000 and neuro-psychologist's report can cost \$5000.

16. Do you think the proposed new rates will increase access to medical reports (and therefore access to justice) for claimants?

- Yes     No     Not sure

Please explain your view.

Yes but does not go far enough.

17. Do you agree with the proposed new maximum costs awardable for Medical and Other Report Costs? (please circle or highlight your response)

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Strongly Disagree
<b>Disagree</b>
Neither
Agree
Strongly Agree

18. Do you think removing the distinction between registered specialist reports and other reports will improve claimant's access to reports?

Yes     No     Not sure

Please explain your view.

Not sure.

### Questions on Category 4 – Other expenses

19. Do you think the new rates will increase access to in-person reviews for rural communities?

Yes     No     Not sure

Why/ why not?

Yes we agree

20. How can 'Other Expenses' (Category 4) be improved to enhance support for rural communities?

Please provide supporting information.

Digital exclusion is a real problem for claimants. Some of our clients have no access to a computer or a printer and during Covid lockdowns, couldn't get access to libraries, community law or CABs in person, they became very isolated. No branch officers of ACC to allow people to get stuff printed off.

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21. Do you agree with the proposed new maximum costs awardable for Other Expenses? (please circle or highlight your response)

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

### Questions on the overall proposed changes to the Regulations

22. Are there any other costs, benefits, or unintended consequences of the proposed changes that have not been considered in this document?

Not sure.

23. Do you think MBIE should conduct regular reviews of the maximum cost caps in the regulations?

Yes     No     Not sure

24. Do you have any comments on the alternative approaches considered?

Happy to discuss in person.

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### Questions on Alternative Dispute Resolution (ADR)

25. If the regulated timeframes are extended while clients are engaged in ADR, what effect do you think it will have on claimant's decisions to use ADR and the external review process? Please provide supporting information.

It is very difficult to get ACC to agree to ADR due the timeframes. Fairway and review specialists are keen to set a matter down just to meet the timeframes. So some claimants miss out on ADR when it would be entirely suitable for them.

26. Have you incurred costs as a result of undertaking ADR? What are these and did it impact on decisions to proceed with an external review?

No, generally we get costs.

27. If a level of reimbursement for costs was to be included for ADR in the Regulations, what should be taken into consideration?

In my experience the cost regulations are being used.

28. Would the inclusion of a level of reimbursement for ADR costs change your position on undertaking ADR in comparison to an external review?

No, it is whether a case is suitable for it.